No. 89-739 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1989

DAVIS ENTERPRISES, ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below correctly held that the decision by the Environmental Protection Agency (EPA) to deny petitioners' request to take an Agency employee's deposition in connection with private tort litigation in state court reasonably applied the criteria set forth in EPA's governing regulations and therefore was not arbitrary, capricious, or an abuse of discretion.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A23) is reported at 877 F.2d 1181. The opinion of the district court (Pet. App. A25-A34) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1989, and the petition for rehearing was denied on August 8, 1989 (Pet. App. A24). The petition for a writ of certiorari was filed on November 6, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises from petitioners' efforts to compel the testimony of employees of the Environmental Pro-

tection Agency (EPA) in private tort litigation in state court to which the federal government is not party. In the state-court litigation, petitioners have been held liable for damages resulting from an accidental gasoline leak that caused gasoline vapors to enter the homes of the plaintiffs; the amount of the damages remains to be tried.

Following the accident, certain EPA employees had performed air-quality monitoring tests in some of the affected homes at the request of state health authorities. The documented results of this testing were made available to all concerned. Petitioners, who allege that the test results are favorable to their position that the plaintiffs suffered little or no injury, wish to use those results in the damages phase of the state-court litigation.[1] In pre-trial discovery during the damages phase of the litigation, petitioners served requests for admissions on the plaintiffs, which include proposed admissions of the authenticity and truth of the results of the tests conducted by EPA. The plaintiffs have refused to admit the truth of the test results without an opportunity to cross-examine the EPA employees who did the work. Petitioners also assert that the test results might not be admissible in evidence under Pennsylvania law in light of the objections of the homeowner-plaintiffs. Pet. App. A3-A4; Pet. 3-5.[2]

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[1] The state-court litigation consists of a class action and several other suits brought by plaintiffs who opted out of the class action. The state trial court permitted the class action to proceed on the question of liability, but held that each class member must prove damages on an individualized basis. After the liability verdict in the class action, the state trial court designated the claims of two individual homeowners (one a class member and one not) to be tried first. See Pet. 4.

[2] Petitioners represented during the oral argument in the court of appeals that they had requested an *in limine* ruling from the state trial court concerning the admissibility of the EPA test results in the absence of an opportunity to cross-examine the EPA employees, but the state court declined to make such a ruling. Pet. App. A4-A5.

2. This is the second case in which petitioners have sought to bring before this Court their unsuccessful efforts in the lower courts to compel the testimony of EPA employees. The first case was *Appeal of Sun Pipe Line Co.*, 831 F.2d 22 (1st Cir. 1987), cert. denied, 108 S. Ct. 2821 (1988), in which petitioner Sun Pipe Line applied for an order from a federal district court to compel testimony in the state-court litigation of one of the EPA employees who had performed the same air-quality tests and was then working in EPA's Region I. Pet. App. A5-A6 & n.1, A28 n.1. EPA, acting through the Regional Counsel for Region I, denied that request for the employee's testimony on the basis of EPA regulations governing requests or subpoenas for EPA employees to provide testimony concerning information acquired in the course of their official duties. 40 C.F.R. Pt. 2, Subpt. C (*reproduced at* Pet. App. A36-A42). Compare *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951). The purpose of the EPA regulations is "to ensure that [EPA] employees' official time is used only for official purposes, to maintain the impartiality of EPA among private litigants, to ensure that public funds are not used for private purposes and to establish procedures for approving testimony or production of documents when clearly in the interests of EPA." 40 C.F.R. 2.401(c). Any such request for an employee's testimony must be approved by the General Counsel (or his designee), and approval will be granted only when allowing the testimony would "clearly be in the interests" of EPA. 40 C.F.R. 2.403.

In the prior case, the First Circuit affirmed the district court's refusal to compel the employee's testimony, rejecting on essentially procedural grounds petitioner Sun Pipe Line's attempt to convert its action seeking "relief in the nature of mandamus" (831 F.2d at 24) into one for review under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, of EPA's decision declining to permit the employee

to testify. The First Circuit did not decide whether such agency decisions are subject to judicial review, 831 F.2d at 24-25, but it did conclude, *id.* at 23 n.3, that its own decision in *Giza* v. *Secretary of HEW*, 628 F.2d 748 (1980), "was clearly controlling" on the issue of the district court's lack of authority to compel a federal employee to respond to a state-court subpoena in his official capacity where his federal employer had given him a contrary instruction.[3] For this proposition, the court of appeals cited (831 F.2d at 23 n.3) this Court's decision in *Touhy*, 340 U.S. at 467-470, which held that a subordinate federal official could not be held in contempt for his refusal to comply with a subpoena *duces tecum* where his superior had precluded compliance under valid federal regulations controlling the release of official documents.

3. a. In this case, petitioners submitted a request to EPA under governing regulations for EPA to authorize a second employee to sit for a videotaped deposition concerning his involvement in the air-quality testing done after the gasoline leak at issue in the state-court tort litigation. Pet. App. A43-A46. Acting pursuant to 40 C.F.R. 2.403, EPA's Regional Counsel denied petitioners' request (Pet. App. A47-A48, A54-A56), based on his determination that the giving of such testimony "would add nothing to our public mission and could be seen as taking sides in the litigation," and that while the time consumed by this particular deposition "may be small, the precedent it sets and the future cumulative effect of similar requests could have a significant impact on the Agency's resources." *Id.* at A47.[4]

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[3] In neither the prior *Sun Pipe Line* case (831 F.2d at 23) nor the instant case (Pet. App. A31 n.2) did the state court actually issue a subpoena for the testimony petitioners sought.

[4] EPA did, however, offer to provide the employee's testimony by affidavit. Pet. App. A48.

b. Petitioners then filed this action in the United States District Court for the Eastern District of Pennsylvania seeking judicial review of EPA's denial of their request for the employee's testimony. The district court granted summary judgment in favor of EPA. Pet. App. A25-A33. It first held that EPA's decision was not subject to judicial review because the "housekeeping" statute under which EPA's regulations were promulgated, 5 U.S.C. 301, provided the court with "no law to apply." Pet. App. A32. In the alternative, the district court held that if review was available, EPA's decision must be sustained because it was based upon a reasonable appraisal of the "parameters" its regulation required to be considered. *Id.* at A33.

c. The court of appeals affirmed. Pet. App. A1-A23. It disagreed with the district court's holding that EPA's decision is unreviewable, finding instead that the "factors enumerated" in EPA's regulations supply the courts with "sufficient law to apply" in reviewing the decision. *Id.* at A6-A11, A17. However, the court of appeals agreed with the district court that EPA's decision should be sustained on the merits. *Id.* at A11-A16. It noted that EPA had not "withheld relevant information as to the test results" from the parties to the state-court litigation, *id.* at A13, and that petitioners did not challenge the EPA regulations under which petitioners' request for the employee's testimony was denied. *Id.* at A17. With the issues thus confined, the court held that EPA had reasonably applied the criteria set forth in its regulations, *id.* at A12-A16, and that EPA had therefore not abused its discretion or otherwise erred, but had instead acted "within the parameters of [its] discretion" as set forth in the regulations. *Id.* at A17.

Judge Weis dissented. Pet. App. A17-A23. He agreed with the majority that EPA's decision was subject to judicial review, *id.* at A17, but believed that the decision should be

set aside as arbitrary and capricious. *Id.* at A22-A23. Judge Weis acknowledged that the regulations under which EPA made its decision must be deemed valid for purposes of this case. *Id.* at A19. But he nonetheless was of the view that EPA should have assessed the "interests of justice" as a "critical factor" in deciding whether to permit the deposition, *id.* at A21, even though EPA's regulations do not identify that as a relevant factor.

ARGUMENT

The court of appeals correctly held that EPA's decision denying petitioners' request for the EPA employee's testimony in private litigation in state court was consistent with governing regulations and was not arbitrary or capricious. That decision does not conflict with any decision of this Court or of another court of appeals, and it presents no issue warranting review by this Court.

1. Petitioners first suggest in passing (Pet. i, 8) that this case presents the threshold issue of whether EPA's decision is subject to judicial review. The court of appeals, however, unanimously ruled in favor of petitioners on that issue, accepting their argument that EPA's own regulations supply sufficient "law to apply" in conducting such review. Pet. App. A6-A11. Regardless of whether the court below correctly decided this issue of first impression against the government, it is not properly presented on *petitioners'* request for review.[5]

2. The issue upon which petitioners actually lost below—whether EPA's decision denying petitioners' request under EPA regulations governing the furnishing of employees' testimony was arbitrary and capricious (Pet. i)—

[5] The reviewability issue would, of course, remain available to respondents as an alternative ground for affirmance of the judgment below if the Court granted the petition.

does not warrant review. As both the majority and dissenting opinions in the court of appeals pointed out (Pet. App. A6, A17, A19), petitioners did not argue in either court below that the governing EPA regulations are invalid. Accordingly, both courts below scrutinized EPA's decision against the backdrop of the discretionary standards set forth in the regulations themselves—regulations that petitioners themselves had urged as the "law to apply" (*id.* at A9, A11). And both courts below found that EPA had considered the factors made relevant by its regulations and reached a reasonable conclusion (*id.* at A12-A16, A33). This conclusion was correct.

The pertinent regulations provide that the Agency will grant a request for an employee's testimony only where it would be "clearly in the interests of EPA" (40 C.F.R. 2.401(c), 2.403), and the regulations list certain purposes that are served by that standard: "to ensure that employees' official time is used only for official purposes, to maintain the impartiality of EPA among private litigants, [and] to ensure that public funds are not used for private purposes" (40 C.F.R. 2.401(c)). The EPA Regional Counsel relied on these factors in denying petitioners' request, noting that although EPA had done the sampling and analysis that was requested of it by state health officials, permitting the EPA employee to testify in the private tort suits "would add nothing to [EPA's] public mission and could be seen as taking sides in the litigation," and "the future cumulative effect of similar requests could have a significant impact on the Agency's resources." For these reasons, the Regional Counsel concluded that it would not be in the interests of EPA to furnish the employee as a witness. Pet. App. A47. Thus, EPA's decision "was based on a consideration of the relevant factors," and petitioners have not shown that "there has been a clear error of judgment" in applying those factors. See *Motor Vehicle Mfrs. Ass'n of the United States,*

Inc. v. *State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Bowman Transp., Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974)).[6]

The decision of the court of appeals sustaining EPA's refusal under applicable regulations to make its employee available in the circumstances of this case does not conflict with any ruling by another court of appeals. Nor is the fact-specific ruling below one of general importance that warrants review by this Court in the absence of a circuit conflict. Indeed, it is not even clear that the decision below will prove to be of practical importance to petitioners,

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[6] Judge Weis's view in his dissent that EPA's decision was not valid under applicable regulations would effectively revise the criteria set forth in those regulations and give primary weight to the "interests of justice" (Pet. App. A21), rather than the "interests of EPA" (40 C.F.R. 2.401(c), 2.403). It apparently is Judge Weis's view that EPA must furnish its employees as witnesses for private parties who show a need for their testimony, even in state court, unless there are "unassailable grounds" for declining to do so. Pet. App. A21. We may assume for present purposes that EPA might have adopted such a policy, and treated the satisfaction of private parties' need for witnesses from EPA as a principal or presumptively dispositive factor. But EPA chose instead to give priority to the statutory missions assigned to it by Congress, and to permit the use of its resources to provide witnesses in private litigation only when that course would also "clearly be in the interests" of the EPA's assigned functions. 40 C.F.R. 2.403. That policy for the allocation of scarce agency resources plainly is not arbitrary or capricious.

In this case, for example, it could not seriously be contended that EPA would have been required to conduct the air-quality testing over its own objection if petitioners asserted a "need" for the expert opinion of EPA's employees in their private litigation regarding the injuries sustained by homeowners. On that theory, EPA would become like a private firm of technical experts. The result is no different here simply because EPA acceded to the request by state health officials to conduct the tests. EPA might be deterred from offering voluntary assistance in the first place if the courts were to hold that EPA would thereby be bound to make its employees available in private litigation to elaborate upon the agency's work product.

because the state trial court has not yet ruled on whether the test results will be admitted into evidence in the state-court litigation despite the unavailability of the EPA employee's testimony.[7]

3. The third and last of the issues raised by petitioners (Pet. i, 10-13)—whether EPA was obliged to consider and give presumptively controlling weight to petitioners' asserted need for the employee's testimony, rather than to the factors set forth in its regulations—is not properly presented for review. Petitioners' current argument, drawn for the most part from Judge Weis's dissenting opinion below, is

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[7] The court of appeals acknowledged (Pet. App. A4-A5) petitioners' claim that the results of EPA's air-quality monitoring might be inadmissible in state court without the supporting testimony of the EPA employee, and that this might hamper petitioners' defense. However, the court also noted that the test results "may in fact be admissible" (*id.* at A15 n.4).

Petitioners do not argue in this Court that the test results are inadmissible as a matter of law in state court by virtue of the judgment below, and they do not foreclose themselves from urging the state court to admit the results into evidence. See Pet. 5 n.2. Moreover, the case upon which petitioners rely for the proposition that Pennsylvania courts do not follow the Federal Rules of Evidence "on expert testimony" (*ibid.*) states only that Pennsylvania does not follow the approach of Fed. R. Evid. 705 by "allowing an expert to testify to his opinion without elucidating underlying factual assumptions." *Kozak* v. *Struth*, 515 Pa. 554, 560, 531 A.2d 420, 423 (1987). Other state cases show that Pennsylvania courts do tend to follow Fed. R. Evid. 703, by permitting expert testimony based upon facts not in evidence when the facts are derived from a source reasonably relied upon by experts in his field. See, *e.g.*, *In re Glosser Brothers, Inc.*, 382 Pa. Super. 177, 198-199, 555 A.2d 129, 139-140 (1989). In light of this and other arguments that petitioners might present to the state court, we doubt that petitioners would concede the correctness of Judge Weis's view that the test results "cannot be submitted to the jury in the state court" without EPA's cooperation (Pet. App. A21). Moreover, as we have noted (see note 4, *supra*), EPA did offer to provide an affidavit by the employee whose testimony was sought.

nothing less than a direct attack upon the very regulations that petitioners not only declined to challenge below, but affirmatively conceded were valid. See Pet. App. A6, A17, A19.[8] Thus, although petitioners argued below that "EPA did not follow its own regulatory criteria" (*id.* at A12), they now argue that EPA's decision must be set aside because "the interests of justice were not taken into account" (Pet. 11)—*i.e.*, because EPA's Regional Counsel did not consider a factor that is not mentioned in EPA's regulations and is quite distinct from the standard upon which those regulations required him to base his decision: whether the testimony would be "clearly in the interests of EPA." 40 C.F.R. 2.401(c), 2.403. Accordingly, the issue to which petitioners now ascribe such importance necessarily entails a challenge to the legal validity of EPA's regulations. Because petitioners did not challenge the regulations below, and because the court of appeals therefore did not decide that question (Pet. App. A17), there is no occasion for this Court to consider it. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).[9]

Nor is there any conflict among the circuits concerning the validity of EPA's regulations that would warrant review

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[8] See Pet. C.A. Reply Br. 13 ("[I]t is Appellants' contention that Regulation 2.403 is valid, but that EPA failed to consider the relevant factors contained in said Regulation and abused its discretion in reaching its decision.").

[9] Petitioners' assertion (Pet. 8) that this case "squarely presents those vexing and very important questions" left open by this Court's decision in *Touhy* is extravagant. EPA has not withheld the test results, under claim of privilege or otherwise. Pet. App. A13. EPA has simply denied petitioners' request to take its employee's deposition. Nor has EPA "shut off an appropriate judicial demand" for information or testimony. *Touhy*, 340 U.S. at 472 (Frankfurter, J., concurring). Unlike in *Touhy*, no subpoena or other "judicial demand" was issued in this case. Pet. App. A31.

by this Court even if that question were properly presented. In fact, the ruling below appears to be the first appellate decision in a case brought under the APA seeking judicial review of an EPA decision denying a request for an employee's testimony for use in state-court proceedings.[10] However, in the related context of a state-court subpoena directed to an EPA employee, the Fourth Circuit recently followed *Touhy* in reversing a district court order enforcing such a subpoena. *Boron Oil Co.* v. *Downie*, 873 F.2d 67, 69-70 (1989). Significantly, the court in *Downie* found that EPA has "a valid and compelling interest" in keeping its employees "free to conduct their official business without the distractions of testifying in private civil actions in which the government has no genuine interest." *Id.* at 71. Noting the "current explosion in environmental litigation," the Fourth Circuit echoed the concerns expressed by EPA's

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[10] As petitioners note (Pet. 9 & n.4), other federal agencies also have regulations governing the manner and extent to which their employees and documents may be made available in private litigation. However, as petitioners also note (Pet. 10 n.6), those regulations differ depending upon the agency, its underlying statutory authority, and its particular missions and needs. There likewise is little case law involving APA review of agency decisions under those regulations.

The federal courts have uniformly followed this Court's holding in *Touhy* when confronted with cases involving subpoenas directed to subordinate federal employees who have been directed not to testify pursuant to their employing agency's regulations. See, *e.g.*, *Nationwide Investors* v. *Miller*, 793 F.2d 1044, 1048 (9th Cir. 1986); *Swett* v. *Schenk*, 792 F.2d 1447, 1451-1452 (9th Cir. 1986); *United States Steel Corp.* v. *Mattingly*, 663 F.2d 68 (10th Cir. 1980), cert. denied, 450 U.S. 980 (1981); *Giza* v. *Secretary of HEW*, 628 F.2d at 751; *Cates* v. *LTV Aerospace Corp.*, 480 F.2d 620 (5th Cir. 1973); *Saunders* v. *Great Western Sugar Co.*, 396 F.2d 794 (10th Cir. 1968); *United States* v. *McLeod*, 385 F.2d 734 (5th Cir. 1967); *Smith* v. *C.R.C. Builders Co.*, 626 F. Supp 12, 14-15 (D. Colo. 1983); *Reynolds Metals Co.* v. *Crowther*, 572 F. Supp. 288, 290-291 (D. Mass. 1982); *Hotel Employees-Hotel Ass'n Pension Fund* v. *Timperio*, 622 F. Supp. 606, 607 (S.D. Fla. 1985).

Regional Counsel in this case (see Pet. App. A47), stating that "a strict adherence to [EPA's] internal regulations is essential if it is to be successful in preventing its expert employees from being targeted as potential witnesses in private actions." 873 F.2d at 72.[11]

In short, the EPA regulations that petitioners now seek to have this Court review (and effectively revise) are of substantial importance to EPA's performance of its statutorily assigned public missions. If the Court were ever to conclude that the validity of those regulations warrants review, that task should be undertaken only in a case in which the issue has actually been litigated and decided below. This is not such a case.

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[11] The Fourth Circuit further recognized EPA's special need for these regulations (873 F.2d at 70):

> Because of the nature of the duties it exercises and programs it administers, the EPA is particularly vulnerable to the demands of private parties seeking information acquired as a result of official investigations * * *. If EPA's On-Scene Coordinators were routinely permitted or compelled to testify in private civil actions, significant loss of manpower hours would predictably result and agency employees would be drawn from other important agency assignments.

Accord, *Environmental Enterprises, Inc.* v. *United States EPA*, 664 F. Supp. 585, 586 (D.D.C. 1987) (if the state courts could "so easily subpoena federal officials" in cases to which the government is not a party, "the officials might find themselves spending all of their time doing nothing but complying * * * and thus they would have little opportunity to pursue their important governmental responsibilities").

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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JANUARY 1990

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—262-203/00713